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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 186

DANIEL A. BOLICH,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner Daniel A. Bolich, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming judgments of conviction of conspiracy to defraud the United States in violation of 18 U. S. C. § 371 and 26 U. S. C. § 4047 (e) (4) after a trial in the District Court for the Southern District of New York, except as to the fine of $5,000 imposed on petitioner Bolich for violation of 26 U. S. C. § 4047 (e) (4), which fine was set aside.

Petitioner was convicted together with two co-defendants, Henry W. Grunewald and Max Halperin, who were each found guilty of conspiracy (18 U. S. C. § 371). Halperin was also convicted on other counts. Petitioner Bolich was sentenced to imprisonment for five years and

fined $10,000 on Count I, and three years imprisonment and fined $5,000 on Count II, such prison sentences to run concurrently.

When the case was first before the United States Court of Appeals, that Court rendered a decision unanimously affirming the judgments of conviction as to petitioner and co-defendant, Grunewald. Frank, Circuit Judge, dissented solely as to the co-defendant, Halperin. On petitions for rehearing, Frank, C. J., dissented from the denial thereof and voted to reverse and grant a new trial as to all the defendants.

The record in this case as printed for the use of the Court below (which included the joint appendix of co-defendants, Grunewald and Halperin; the separate appendix on behalf of the petitioner, Bolich; and the Government's appendix) together with such additions as are necessary to show the opinions and proceedings in the United States Court of Appeals, are filed herewith in accordance with the Rules of this Court.

Opinions Below

The majority and first dissenting opinions of the Court of Appeals were filed April 10, 1956. The case has not yet been officially reported.

On petitions for rehearing or to stay the issuance of the mandate and to continue bail, the petitions for stay of mandate and continuance of bail as to each of appellants were granted, but the petitions for rehearing were denied by a divided Court, Judge Frank dissenting in an opinion as to the petitions for rehearing and voting for reversal and ordering a new trial for all the defendants. The opinion on the petitions for Rehearing has not yet been officially reported. The opinions referred to are printed in a separate appendix (Volume V, Appendix, pp. 288A to 357A; 380A to 393A).

Jurisdiction

The judgment of affirmance by the United States Court of Appeals was entered on April 10, 1956. A timely petition for a rehearing was duly filed on April 24, 1956 within the fifteen days allowed by Rule 25 of the Rules of that Court and was denied by order dated and entered June 1, 1956 (Judge Frank, dissenting as to all defendants).

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1) and Rule 37 (c) of the Federal Rules of Criminal Procedure.

Questions Presented

1. Whether the three year Statute of Limitations, applicable to the charge of conspiracy, barred conviction of the petitioner Bolich inasmuch as the objective of the alleged conspiracy had been achieved by January, 1949—more than five years before the date of the indictment which was filed on October 25, 1954.

2. Whether multiple conspiracies were established by the evidence, rather than a single general conspiracy, to the substantial prejudice of the rights of the petitioner Bolich.

3. Whether the Court below erred in overruling petitioner Bolich's contention that the evidence failed to connect him with any conspiracy and in the entire record there can be found no substantial evidence that is not consistent with his innocence.

4. Whether the trial Court committed prejudicial error in refusing to strike out the testimony of Everett Harding and Daniel Olsen.

5. Whether the trial Court committed prejudicial error in allowing the government witness Davis to rehabilitate his own testimony by proof of a previous hypothetical statement allegedly made by his attorney.

6. Whether the trial Court committed prejudicial error in permitting the government to elicit from the defendant Halperin upon his cross-examination that he had invoked the Fifth Amendment at a Grand Jury hearing and the trial Court charged the jury that they might consider Halperin's claim of constitutional privilege as adversely affecting his credibility.

Statutes Involved

18 U. S. C. § 371. *Conspiracy to Commit Offense or to Defraud the United States*

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years or both."

26 U. S. C. § 4047 (e) (4).

§ 4047 (e) *Other Unlawful Acts of Revenue Officers or Agents*

"Every officer or agent appointed or acting under the authority of any revenue law of the United States • • •

(4) Who conspires or colludes with any other person to defraud the United States; • • • shall be dismissed from office, shall be fined not less than $1,000. nor more than $5,000., and be imprisoned not less than six months or more than three years. • • •"

Statement of the Case

On October 25, 1954, an indictment was returned in which petitioner, Daniel A. Bolich, former Assistant Commissioner of Internal Revenue, was named as defendant together with seven others. The jurisdiction of the District Court was invoked because the case arises under the United States Criminal Code.

The indictment contained seven counts (Grunewald Halperin-Appendix, 5-19).* *Count I* on which petitioner was convicted alleged that beginning on or about January 1, 1946, and continuing up to and including the date of the filing of the indictment (October 25, 1954), all defendants, together with others named as co-conspirators but not indicted, conspired, in violation of the general conspiracy statute, to defraud the United States in the administration of the revenue laws and to influence witnesses before a grand jury and before a congressional investigating committee and charged that defendants and co-conspirators would make continuing efforts to avoid detection and prosecution through the use of any means whatsoever and generally obstructing justice. Thirteen overt acts were alleged, of which one concerned petitioner (10) as follows:

> "8. On or about December 20, 1951, within the Southern District of New York, the exact place to the Grand Jury unknown, defendant DANIEL A. BOLICH had a telephone conversation with one Everett Harding."

The *second count* also charged Bolich, Steinberg and Scherm, as employees of the Internal Revenue Bureau

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* References, unless otherwise indicated, are to the pages in the joint appendix of Grunewald and Halperin. References to appellant Bolich's appendix in Court of Appeals are designated as "Bolich App."

with a conspiracy to defraud the United States in violation of 26 U. S. C. § 4047(e)(4) and is precisely the same as charged in the first count (11-14). Growing out of the same transaction alleged in the first count, the second count covers exactly the same period of time involved in the first count.*

The *third count* was disposed of by granting petitioner's motion for judgment of acquittal at the close of the Government's case. The *fourth count* was dismissed before trial on consent of the government. The trial Court also granted motions by defendants Bolich and Grunewald for judgment of acquittal as to the *fifth, sixth and seventh counts* which alleged in substance that the defendants did unlawfully endeavor to influence witnesses in March, 1952, to give false testimony and to obstruct justice concerning certain income tax fraud investigations being conducted by a Brooklyn Grand Jury (583).

The record of this joint trial is voluminous extending over 5,400 pages. The evidence upon which the government relied to establish the offenses charged in the indictment against the defendants was as to each of the defendants different and in large measure wholly disconnected. Yet, in the great mass of the testimony, there is not a shred of evidence which links the petitioner Bolich with any conspiracy or that he participated therein or had any knowledge thereof. The government's case against him is based entirely upon circumstantial evidence. We shall confine our statement to such facts as are material to the questions presented as required by Rule 23(1)(e), for obviously we cannot cover the case completely within limits reasonable for a petition for certiorari.

The government proceeded upon the theory that the alleged conspiracy involved the corrupt and illegal dis-

* Defendants Steinberg and Scherm were acquitted.

position of two separate tax cases, namely *Pattullo Modes, Inc.*, a dress manufacturing company, and *Gotham Beef Co.*, a meat firm, which were under investigation in 1948 by the Internal Revenue Department. Both of these companies were clients of the law firm of Schopick & Davis who were named as defendants in the indictment, but were granted a severance of the trial upon the government's motion.

I

The *Gotham Beef* case was one of the cases which had been assigned for review in April, 1948, to Herman F. Kuehl, employed by the Internal Revenue Service in New York. His duties were to prepare reports and recommendations in such cases in conformity with Bureau policy and to hold conferences on settlements (277). Bolich was then Special Agent in charge of the Fraud Bureau employing about 150 agents at that time (285). In July, 1948, Bolich telephoned Kuehl that Davis was in his office concerning the *Gotham Beef* case, contending that over-ceiling purchases and over-ceiling sales washed out each other and that Davis had checks and invoices to support his client's claim that there was no tax evasion (278). When Davis outlined the claims advanced on behalf of his client, Bolich advised him to "submit everything to (the conferee) Mr. Kuehl" (320).

Kuehl thereafter arranged a conference with Davis for August 16, 1948, which was attended before him by Davis, Special Agent Mullenbach, one of the members of the Gotham Beef Company and their accountant (280, 282).

Kuehl requested Davis' cooperation in submitting net worth statements relating to the principals of the company (282).

After that conference was concluded, Kuehl instructed Special Agent Mullenbach to submit a supplemental report after he had completed his further investigation (283).

Subsequently, Mullenbach recommended criminal prosecution in his supplemental report, which Kuehl reversed after conferring with his immediate superior, Mr. Baradel, head of the Conference and Review Section at the special agent's office (283, 476). Both Kuehl and Baradel agreed that it was "a very weak case" (283-4). Petitioner Bolich then was no longer the agent in charge at the New York office, having left to take up his duties in Washington (271, 286).

Kuehl notified Davis on October 28, 1948, that the *Gotham Beef* case would be closed for civil settlement, with no criminal prosecution, but with the imposition of a civil fraud penalty (284).

Kuehl declared that petitioner Bolich did not request him to do anything improper in the case and that Kuehl's decision was based on his own best judgment (285-6).

Walter Murphy was the acting agent in charge in October, 1948, and the reversal of Mullenbach's supplemental report was affirmed by Mr. Murphy (R. 2130-2).

The purpose of the alleged conspiracy as testified to by Mr. Tobias in the *Gotham* Beef case was stated as follows:

> "Now, the exact terms of the escrow * * * was * * * that until I were to have heard with my own ears from the special agent's office from a responsible official that there was to be no criminal prosecution in the Gotham matter, * * * the money was not to be released" (167).

II

Davis testified with respect to the *Pattullo Modes* case that he consulted with Mr. Schwaeber, an attorney, in September or October, 1947, to retain him as counsel when the case went to the special agent's office, of which Bolich was then the agent in charge (308). According to Davis, Schwaeber said he was not sure that he would like to rep-

resent the taxpayers because his relationship with Bolich was not of the best, but he expected to form a law partnership with James Saver and he knew that Saver's relationship with Bolich was far better (309).

Davis went on to say that Saver told him in March, 1948, that he had discussed the matter of a voluntary disclosure with Bolich, who replied that he did not believe a voluntary disclosure had been made (311).

Davis testified that Halperin told him to tell Saver to see Bolich in Washington (332). Mr. Saver went to Washington and reported back to Davis in November, 1948 that Bolich said to him:

> "• • • if the taxpayers cooperated fully and developed all of their income that he would recommend that the case be given a no-prosecution consideration" (332).

Mr. Baradel testified that on January 5, 1949, Bolich telephoned him regarding the *Pattullo Modes* case. Baradel advised him that he had ruled against the taxpayers on their claim of voluntary disclosure (476). Bolich agreed that although his (Baradel's) decision was technically correct he had decided after a visit from Saver and Quinn (attorneys representing *Pattullo Modes*) that if the taxpayers gave full cooperation to the agents, the case ought to be closed on a non-prosecution basis (476). Bolich told Baradel he was taking full responsibility for this action and said "let the record show it" (485).

At the meeting in Baradel's office on January 10, 1949, Mr. Saver called attention to Bolich's promise and after Baradel learned that full cooperation had been given by the taxpayers, he declared that he would close the case against them without prosecution, but with a 50 per cent penalty (334, 478).

Baradel further testified that he had determined definitely against prosecution and he reached that decision

honestly in the exercise of his best judgment and discretion (491, 6, 7).

The purpose of the alleged conspiracy in the *Pattullo Modes* case was thus stated by Mr. Marks, one of the principals connected with that concern:

> "He [Davis] says all he could promise us that there would be a memorandum put into our file that the case was to be settled on a civil basis" (36).

III

On the motions made by defendants for judgment of acquittal at the close of the Government's case, the Government conceded that there was no claim of any overt acts within three years prior to the indictment other than the acts relating to so-called alleged concealment (579).

Insofar as Bolich is concerned, the overt act with which he is charged in the indictment, related to a telephone conversation had on or about December 20, 1951, with one Everett Harding (10).

Harding, Assistant Manager of the Hotel Washington, Washington D. C. testified, among other matters, that in the summer of 1950, Bolich requested his hotel bills for approximately a year back so that he might review them (Government's App. 165a). About a month or two later, Harding handed a compiled record of bills to Bolich, which did not include voucher records such as long distance telephones and restaurant charges (Gov'ts. App. 165-6a). Harding claimed that the records were never returned to him (Gov'ts. App. 166a). In December, 1951, when the King Committee subpoenaed these records, the hotel management requested Bolich to return them. (Gov'ts. App. 166-7a). On December 20, 1951, Bolich telephoned Harding and we quote from the record:

> "Q. What did he say? A. The substance of the call was that Mr. Bolich said he had not received the rec-

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UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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ords—let us see now, it has been so long ago, sir, I am sorry, I will do my best—he had not received the records, that he had been in bed with a bad heart * * *" (Gov'ts. App. 169a).

Harding had no clear recollection of this conversation and sought to refresh his memory by the use of a memorandum (Gov'ts. App. 169-170a). He then modified his testimony as follows:

"Mr. Bolich said he did not receive the records, and later in his conversation said he simply did not remember ever having received them; that if he had, he knew he had not taken them from the office or away from the office; that it could have been that he might have laid them on Mr. Rhodes' desk [Executive assistant manager of the hotel] or something of the sort there, that he knew he had never taken them away from the office" (Gov'ts. App. 170-1a).

Bolich told him there must be other records and if the hotel had its voucher records, they could reconstruct their bills from that (Gov'ts. App. 171-2a).

On cross-examination, Harding stated that all voucher records were destroyed by the hotel every two years, and larger bills were kept five years (Bolich App. 824). These records were discarded in the usual course of business and was not done at Bolich's request (Bolich App. 824).

Daniel Olsen, a carpenter, testified that on September 28, 1950, he did a very small carpentry job at Bolich's home in Brooklyn (553). Bolich asked him to open up the baseboard in a clothes closet in the upstairs room for a compartment that could be used to put some papers away (553). The base was about 8 inches wide and the moulding 2 inches wide, so that the opening would be about 10 inches (554). He said Bolich told him it was to be a hiding place for secret Washington papers (555).

On cross-examination he said that Bolich did not tell him that he had a home elsewhere than in Brooklyn and that Mr. and Mrs. Bolich left the house alone for quite some period of time (Bolich App. 826).

Reasons for Granting the Writ

This Court in the exercise of its judicial discretion ought to grant this petition for a writ of certiorari for the special and important reasons set forth below:

1. Concerning the issue of the Statute of Limitations.

In the majority opinion below, it is stated that the question of the Statute of Limitations urged as a bar to the prosecution herein by the appellants "is an interesting and important question, seemingly one of first impression" (Vol. V, App. p. 299a)* Because of a serious error in the trial Court's instructions on that issue, Judge Frank dissented on the petitions for rehearing and voted to grant a new trial for all the defendants (Vol. V, App. 381a-393a).

It is clear that the object and purposes of the alleged conspiracy ended in the *Pattullo* case on or about January 12, 1949 (overt act, No. 2, Grunewald App. 10) and in the *Gotham* case sometime between October 27, 1948, and November 9, 1948 (overt act No. 5, Grunewald App. 10). The indictment herein was filed October 25, 1954. The Statute of Limitations was, therefore, a complete defense to the prosecution and an insuperable obstacle in the government's way, because the three-year period under the general conspiracy statute barred any prosecution. To save the case from the bar of the statute, the prosecution ingeniously attempted to make part of an earlier alleged

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*Grunewald and Halperin are also filing separate petitions for certiorari.

conspiracy in 1946, an alleged later conspiracy in 1951-2, which could not possibly have been a part of it and by this transparent means and contrivance to emasculate the Statute of Limitations.

The argument on this question is dealt with so comprehensively by counsel for the petitioners Grunewald and Halperin, that we urge that their contentions made on this vital issue be considered with the same force and effect as if restated here, since it is also applicable to petitioner Bolich.

In brief, the decision of the Court below is in conflict with applicable decisions of this Court in *Krulewitch* v. *United States,* 336 U. S. 440, and *Lutwak* v. *United States,* 344 U. S. 604. The trial judge charged that the Statute of Limitations on count 2 was five years (759). Bolich contended before the Court below that counts 1 and 2 charged identical offenses and that, hence, the verdict of guilty under both counts convicts him twice of the same offense.

As we have stated, the Court below unanimously set aside the fine of $5,000 imposed on Bolich under count 2. If the fine was invalid, we respectfully submit that the Court below should also have vacated the judgment of conviction under count 2 and the sentence as to the imprisonment under count 2 should have been adjudged void, for the one cannot be separated from the other (*Snitkin* v. *United States,* 265 Fed. 489 (C.C.A. 7). In 24 C. J. S. Criminal Law, § 1990, it is said:

> "The constitutional principle that no one shall be put in jeopardy twice for the same offense, is broad enough to mean that no one can be lawfully punished twice for the same offense; the one follows from the other, and the constitutional provisions are designed to protect accused from a double punishment as much as to protect him from two trials."

2. On the question of multiple conspiracies.

The trial herein was "conducted * * * on the assumption that it was immaterial whether the proof showed one conspiracy with which all of the defendants were connected, or separate conspiracies with which some, but not all of them were" (*Brooks* v. *United States,* 164 Fed. 2d 142 (C. C. A. 5)).

This case points up vividly the evils of the single-count conspiracy indictment discussed by Mr. Justice Jackson in his concurring opinion in *Krulewitch* v. *United States,* 336 U. S. 440, 445-6*.

Upon the trial, Bolich's counsel joined in the motions seeking a dismissal of the First Count upon the ground of variance between the pleadings and the proof (558, 561).

The case at bar clearly falls within the principle of *Kotteakos* v. *United States,* 328 U. S. 750, and the decision of the Court below is directly in conflict therewith. It is also in conflict with *United States* v. *Siebricht,* 59 Fed. 2d 976 (C. A. 2).

3. On the question of Bolich's motion for judgment of acquittal.

The whole case against Bolich hung on one single gossamer thread of suspicion—his friendly acquaintanceship with Grunewald—a mere circumstance sufficient at best to

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* The Court below in its majority opinion (Vol. V., App. 303a) stated:

> "The record contains ample proof of efforts by the conspirators to forestall suspicion and wipe out traces of their efforts developed later and in 1951 and 1952 into an intensified campaign of concealment, the details of which will be referred to briefly in connection with the charges against Halperin in Counts 5, 6 and 7."

There is not a particle of evidence which in any way links petitioner Bolich with the charges in Counts 5, 6 and 7, *on which Bolich was acquitted by direction of the trial court* (583).

create only a surmise, guess or conjecture of any conspiracy. There is no evidence from which any inference could be drawn that Grunewald ever mentioned the *Pattullo* or *Gotham* or any other case to Bolich. There is no evidence from which any inference could be drawn that the conduct of Bolich was unlawfully and corruptly influenced by anyone. There is no evidence from which any inference could be drawn that Bolich acted together with anyone with a common unlawful design and for a common corrupt purpose, or that he benefited therefrom.

As a matter of law, the circumstantial evidence did not authorize the inference of critical facts from which the conclusion of guilt was drawn. Those facts were not proved, but were left to conjecture. Particularly applicable here is what was said by Cardozo, J., in *People* v. *Galbo*, 218 N. Y. 283, 294:

> "* * * conjecture has filled the gaps left open by the evidence and the presumption of innocence has yielded to a presumption of guilt."

We are well aware that the weight of conflicting testimony was neither for the trial judge nor the appellate court. But we do maintain that considering all the evidence in the light most favorable to the prosecution and unfavorable to petitioner Bolich, that the trial judge erred in denying his motion under Rule 29 of the Federal Rules of Criminal Procedure for a judgment of acquittal upon the ground that the evidence so far as Bolich is concerned was insufficient as a matter of law, to sustain a conviction (Bolich App. 22-4).*

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* *Rule 29—Federal Rules of Criminal Procedure*, provides:

"(a) *Motion for Judgment of Acquittal.* * * * The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. * * *"

4. As to motions to strike out testimony.

At the close of the case, counsel for Bolich moved to strike out the testimony of Everett Harding, Assistant Manager of the Hotel Washington, upon the ground that there was no substantial evidence to show that even if a conspiracy existed, the telephone conversation in December, 1951—alleged as an overt act in Count I—was in furtherance of such conspiracy. The motion was denied and exception noted (Bolich App. 828-30). The record shows that Bolich and his wife first registered at the Washington Hotel on September 7, 1948 (R. 3220). Harding testified as to Bolich's continued occupancy there to April, 1951 (510, 520-1, Gov't. App. 177A-178A). Harding produced the hotel records consisting of copies of bills rendered to Bolich relating to such residence for the entire period mentioned.

The so-called "missing records" consisted of bills rendered to Bolich from June, 1949, to June, 1950, for valet services, laundry and similar items, but did not include such voucher records as long-distance telephones and restaurant charges (Gov'ts. App. 165A-166A).

The government avidly seized upon the alleged "missing records" and Bolich's telephone call to Harding in December 1951 as the sole overt act charged against him in the indictment. The record is clear that Bolich's occupancy at the hotel was known and recorded at all times and was never concealed (see Gov'ts. Exhibit 62). Items concerning Bolich's valet services, laundry etc. and Bolich's phone call to Harding in December 1951 could not have had the remotest connection in furtherance of the alleged conspiracy.

Harding's testimony was not related to the conspiracy alleged and had no tendency whatever to support the charge. It permitted the jury however, to draw the inference that the telephone call was an overt act done to effect the object of the conspiracy though there was no

evidence to sustain such a finding. The jury should not have thus been licensed to make a conjecture upon a ground that had no evidentiary basis.

Bolich's counsel also moved to strike out the testimony of Olsen, the carpenter, to which we have already referred in our statement of the case (Bolich App. 830). The motion was denied and an exception taken (Bolich App. 830).

In *People* v. *Van Aken*, 217 N. Y. 533, where a judgment of conviction—as in Bolich's case—rested on circumstantial evidence, Judge Cardozo, writing the opinion for reversal, concluded as follows:

> "The line was not drawn between inference and conjecture, between legitimate deduction and unregulated suspicion."

Similarly, in the case at bar, the jury was permitted to find by means of the merest guesswork that Bolich was connected with the conspiracy charged. The motions to strike out the testimony of Harding and Olsen should have been granted. Such testimony was without any probative value whatever and was injected as a sham and pretense to circumvent the Statute of Limitations and to extend the bar of the statute indefinitely.

5. As to the trial Court's ruling in allowing Davis to rehabilitate his own testimony by proof of a prior hypothetical statement made by his attorney.

This vital question is considered most exhaustively in the petitions which will be filed on behalf of Grunewald and Halperin. It would therefore serve no useful purpose to repeat the arguments therein contained, which we adopt in all respects.

6. As to the cross-examination of the defendant Halperin on his claim of privilege against self-incrimination and the Court's charge on that subject.

The original dissenting opinion of Judge Frank raises a most serious constitutional question especially in the

light of the recent decision handed down by this Court in *Slochower v. Board of Higher Education*, 350 U. S. 551.

The invasion of the defendant Halperin's constitutional rights, coupled with the trial judge's instruction that the jury might consider his assertion of his constitutional privilege as affecting the credibility of his other testimony at the trial, necessarily affected and prejudiced the petitioner Bolich as well as Grunewald, because he was the only witness for this group of defendants.

If Judge Frank is right in his original dissenting opinion, and the rationale of the *Slochower* case, *supra*, applies, then the conclusion is inescapable that the challenged ruling and instruction was erroneous and rendered impossible a fair and objective consideration of the evidence against petitioner Bolich by the jury. The jury's verdict could well have been influenced by this serious error. The record shows that all counsel vigorously protested the trial judge's ruling and instruction on this subject and moved for a mistrial (696, 697-8, 702-5, 776-9).

This question alone is far reaching in its application and importance in the administration of the criminal law and should be settled by this Court, as indicated in Judge Frank's original dissenting opinion.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

June 18, 1956.

Respectfully submitted,

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